EXHIBIT 6

SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A, P.C., individually and on behalf of all persons and entities similarly situated,

Plaintiffs,

v.

STAPLES, INC. and QUICK LINK INFORMATION SERVICES, LLC,

Defendants.

Civil Action File No.
2003-RCCV-728

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Mattison R. Verdery, C.P.A., P.C. ("Verdery" or "plaintiff"), individually and on behalf of all other persons and entities similarly situated, submits this brief in opposition to the defendants' motion for summary judgment and in support of plaintiffs' cross-motion for partial summary judgment as to certain affirmative defenses raised by the defendants.

I. INTRODUCTION

This is a junk fax case brought against Staples, Inc. "(Staples") and Quick Link Information Services, LLC ("Quick Link") pursuant to The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA").[1] Verdery, a small Richmond County accounting firm, utilizes a telephone facsimile ("fax") machine in its business. In March, 2003, Verdery received an unsolicited fax advertising Staples' products (the "Fax") transmitted to Verdery's fax machine

[1] A copy of the statute is attached at Tab A to Appendix to Plaintiff's Cross-Motion for Partial Summary Judgment (references herein to the Appendix shall be cited as "Append., __").

by Quick Link.[2] Although prior to receiving the Fax plaintiff had purchased office products from Staples, plaintiff never requested nor gave Staples express permission to send fax advertisements to its fax machine.

Verdery seeks certification of a class of approximately 160,000 to 180,000 customers of Staples who received the Fax and other unsolicited faxes from Staples or Quick Link advertising Staples' products ("Staples Faxes"). The plaintiff contends that each transmission of Staples Faxes to class members violates the Telephone Consumer Protection Act of 1991 (the "TCPA"), and that the defendants are jointly liable in the amount of $500 for each one sent to class members. In addition, Verdery seeks treble damages of $1,500 for each transmission of the Staples Faxes upon a finding that the defendants knowingly or willfully do so.

II. FACTUAL STATEMENT

On about March 18, 2003, the plaintiff received the Fax advertising the commercial availability of Staples' products. Plaintiff's Verified Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages ("Amended Complaint"), ¶ 16. The Fax was transmitted by defendant Quick Link on behalf of Staples. Id.; Defendant Quick Link Information Services, LLC's Response to Plaintiff's First Interrogatories ("QL Interrog. Resps."), ¶ 1. In addition to the plaintiff, Quick Link transmitted the Fax to between approximately 160,000 to 180,000 other class members, all of whom Staples' contends are customers with a prior business relationship with Staples and who provided Staples with their facsimile telephone numbers. Amended Complaint, ¶ 17; QL Interrog. Resps., ¶¶ 2-8; Affidavit of Jay D.

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[2] A copy of the Fax is attached as Exhibit "B" to plaintiff's Class Action Complaint for Damages and Injunctive Relief ("Complaint").

Brownstein in Support of Motion for Class Certification ("Aff. of Counsel"), ¶ 9(a) and (b), Exs. A and B; Defendants' Statement of Theory of Recovery and Statement of Material Facts Which are Not in Dispute ("Defs. Stm. Mat. Facts"), ¶ 15; Affidavit of Peter Howard dated November 20, 2003 ("Howard Aff."), ¶ 9.

The Fax was transmitted to each class member in the same fashion. Staples provided Quick Link with a database identifying intended recipients of the Fax. QL Interrog. Resps., ¶¶ 1-3. Staples also provided Quick Link with the advertising content of the Fax. Id., ¶¶ 4, 10. Using its own technology and equipment, Quick Link "broadcasted" or transmitted the Fax to each member of the class. Amended Complaint, ¶ 17; QL Interrog. Resps., ¶¶ 1-4, 61, 22; Defendant Quick Link Information Services, LLC's Responses to Plaintiff's First Request for Production ("QL Doc. Resps."), QL 003-006, 00010-0014. In addition to the Fax, the plaintiff is informed that the defendants sent other Staples Faxes to the plaintiff and class members both before and after transmission of the Fax. See Aff. of Counsel, ¶ 9(e); QL 0010; Verdery dep., pp. 21-22; Howard Aff., ¶ 9.

Prior to receiving the Fax, the plaintiff had purchased office products and supplies from Staples. Deposition of Matt Verdery dated September 29, 2003 ("Verdery dep."), pp. 6-8, 17; QL Interrog. Resps., ¶ 8; Responses of Defendant Staples to Plaintiff's First Interrogatories ("Staples Interrog. Resps."), ¶¶ 7, 11; Howard Affidavit, ¶¶ 4-8. In addition, prior to receiving the Fax the plaintiff applied for Staples' "Business Rewards" program. Id., ¶ 4; Verdery dep., pp. 8-9. In connection with either making purchases of Staples products or the "Business Rewards" application, the plaintiff is believed to have provided Staples with its fax telephone number. Verdery dep., pp. 12-13, 15; Affidavit of Mattison R. Verdery dated November 6, 2003

("Verdery Aff."), ¶ 6; QL Interrogatory Responses, ¶ 8; Howard Affidavit, ¶ 6. However, at no time did plaintiff give Staples express permission or invitation to receive fax advertisements concerning Staples' products. Verdery Aff., ¶ 7.

III. ARGUMENT AND CITATION OF AUTHORITY

A. THERE IS NO "ESTABLISHED BUSINESS RELATIONSHIP" EXEMPTION TO THE TCPA'S BAN OF UNSOLICITED FAX ADVERTISEMENTS.

The TCPA marks the federal government's first serious step to curb the onslaught of telemarketing. The statute restricts the use of various technologies for sending unsolicited advertisements, including automatic telephone dialing systems, artificial or prerecorded voice messages and fax machines. To balance the legitimate interests of advertisers while protecting consumers from intrusive advertising practices, the TCPA regulates each telemarketing practice in a different way.[3] It treats these diverse advertising media separately in order to accommodate inherent technological differences between them. To the extent that the defendants apply the TCPA's provisions for different media interchangeably (i.e., prohibitions for prerecorded voice messages as authoritative for prohibitions on junk faxes), they misread the law. The TCPA's provisions are not interchangeable.

In 1992, the FCC issued a Report and Order that sent conflicting signals about the

[3] For instance, automatic telephone dialing systems, unless used for emergency purposes or with prior express consent of the called party, may not lawfully make calls to emergency lines, to any health care facility or similar establishment, or to numbers assigned to radio common carrier services or any service for which the called party is charged for the call. 47 U.S.C. § 227(b)(1)(A). Prerecorded message calls to residential telephone numbers are prohibited unless delivering emergency messages or otherwise exempted by Federal Communications Commission rules. 47 U.S.C. 227 § (b)1)(B). Unsolicited advertisements may not be transmitted by telephone facsimile machines without the intended recipient's prior express invitation or permission. 47 U.S.C. § 227 (a)(3) and (b)(1)(C).

TCPA's prohibition on junk faxing. The FCC commented that "in banning telephone facsimile advertisements, *the TCPA leaves the Commission without discretion to create exemptions* from or limit the effects of the prohibition; thus, such transmissions are banned in our rules as they are in the TCPA." 7 F.C.C.R. 8,752, 8,779 n. 87 (citations omitted, emphasis added). However, the FCC draftsman went on to say that "facsimile transmission[s] from persons or entities who have an established business relationship with the recipient *can be deemed* to be invited or permitted by the recipient." Id. (emphasis added). The defendants seize on the FCC's "deeming" language as evidence that the FCC thereby created an exception for "established business relationships" to the TCPA's ban on junk faxing.

The fatal defect in this argument is it overlooks the clear intent of Congress embodied in the TCPA. During the legislative process, Congress considered and eliminated language which would have created an established business relationship exemption when it passed the statute, evidencing an intent that such relationships *not* constitute a defense to TCPA liability. The TCPA, as passed, explicitly requires express invitation or permission from the recipient to the faxer. Congress did not authorize the FCC to create any exemptions to the TCPA's ban on junk faxing (see full discussion below). Because the FCC lacked the authority to establish an exemption to junk fax liability, and because the established business relationship exemption championed by the defendants is directly contrary to the clear language and intent express by Congress, this Court should find and declare that no such exemption exists.

1. **The legislative history demonstrates a congressional election of "express invitation or permission" in lieu of "established business relationship" for regulation of junk faxing.**

Congress considered and rejected an "established business relationship" exemption to the

ban on junk faxing when it passed the TCPA. The draft bill passed by the House of Representatives contained a definition of "unsolicited advertisement" making it illegal to send faxes "(A) without that person's prior express invitation or permission, *or (B) with whom the caller does not have an established business relationship*." H.R. 1304, 102d Cong., 1st Sess. §3, §227(a)(4) (passed by House, Nov. 18, 1991) (emphasis supplied). Congress deleted the established business relationship exemption from the definition of "unsolicited advertisement" before it passed the TCPA. See 47 U.S.C. § 227(a)(3); 137 Cong. Rec. S18781 (Nov. 27, 1991) (Statement of Sen. Hollings) (stating amended version of S. 1462 incorporates principal provisions of H.R. 1304). When Congress deletes language from a bill before enacting it, the deleted language cannot be penciled back in later by an administrative agency or the courts. See Gulf Oil Corp. v. Copp Paving, Co., 419 U.S. 186, 200 (1974) (stating Congress's deletion of provisions from bill shows Congress does not intend result it expressly declined to enact).

2. The TCPA explicitly adopted "express invitation or permission" as the standard for acceptable facsimile advertising.

The FCC is bound by the clear language of the TCPA requiring prior express permission for advertisements to be lawfully sent by fax. "Deeming" or "inferring" a relationship to be an invitation or permission is not the same as express invitation or permission. The mere existence of a business relationship, without more, does not satisfy the TCPA's explicit requirement of express invitation or permission. Further, as the statute makes clear, the FCC cannot create exemptions to the TCPA junk fax prohibition. The plain language of the TCPA's prohibition against junk faxes, combined with the equally clear definition of what is an "unsolicited

computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). Moreover, Congress made it clear that in order to lawfully send an advertisement by fax, the advertiser must have express permission before sending the fax. See 47 U.S.C. § 227(a)(3) (definition of "unsolicited advertisement").

That Congress omitted any invitation to the FCC to create exemptions to its junk faxing ban demonstrates a considered judgment on the part of Congress that exemption-making authority for the FCC was neither necessary nor desirable in the regulation of junk faxing. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[6] Congress' refusal to authorize the FCC to create exemptions to the TCPA junk fax ban after it authorized the FCC to create exemptions to the ban on prerecorded message calls was deliberate and meaningful.

The established business relationship "exemption" contemplates a broader "safe harbor" for facsimile advertising than the language enacted by Congress — "express permission." The FCC's action was not a benign attempt to "clarify" ambiguities or fill conceptual voids in statutory language; it was an improper attempt by the FCC to reinsert an exemption into the TCPA's ban on junk faxing that Congress specifically deleted. Entering a business relationship, (or as would more often be the case, entering into transactions such as Verdery's purchases of office products from Staples) is not the same as granting express permission to receive junk-fax advertising. There is no rational basis or grant of authority that justifies the FCC "deeming" such a business relationship to be an express invitation to receive junk fax advertising. Such an

[6] Rodriguez v. United States, 480 U.S. 522, 525 (1987) (citations omitted).

advertisement,"[4] requires no interpretation. The language is so clear and unambiguous as to remove any reasonable doubt that Congress considered and conclusively addressed the issue. Therefore, any permission to send junk faxes must be express, not implied.

3. Congress did not authorize the FCC to create any further exemptions to the TCPA's ban on junk faxing.

A comparison of the TCPA's provisions restricting prerecorded messages and junk faxes illustrates a conscious choice by Congress as to how to utilize the FCC. For prerecorded messages, Congress granted the FCC authority to draft exemptions to the TCPA's ban on prerecorded message calls to the home. Congress made it unlawful to use "an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, *unless the call is* initiated for emergency purposes or is *exempted by rule or order by the Commission under paragraph (2)(B)*." 47 U.S.C. § 227(b)(1)(B)(emphasis added).[5] But Congress omitted any authorization to the FCC to create exemptions to the ban on sending unsolicited advertisements to fax machines. Compare 47 U.S.C. § 227(b)(1)(B) with 47 U.S.C. § 227(b)(1)(C). Congress specified that it was unlawful "to use any telephone facsimile machine,

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[4] "The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(3).

[5] Pursuant to this explicit grant of authority from Congress, the FCC saw fit to create an established business relationship exemption to the TCPA's ban on prerecorded message calls to the home. Appellant does not challenge the FCC's authority to craft exemptions to the prohibition against prerecorded messages calls to the home. The exemption, originally codified at 47 C.F.R. § 64.1200(c)(3), is now codified at 47 C.F.R. § 64.1200(a)(2)(iv). There are no "exemptions" from the TCPA's ban on junk faxing found anywhere in 47 C.F.R. § 64.1200, either the original codification or the new version. The original FCC regulations promulgated under the TCPA can be found at 7 F.C.C.R. 8, 752 (Apr. 17, 1992). The FCC released a new Report and Order revising its prior regulations under the TCPA on July 3, 2003. This new Report and Order can be found at 18 F.C.C.R. 14,014 (July 3, 2003).

"interpretation" dilutes the TCPA's protections, contrary to Congress's clear intent.

4. Courts have consistently upheld the clear language of the TCPA and refused to read into it an established business relationship 'exemption' to liability for junk fax violations.

Courts have unanimously rejected an established business relationship exemption defense.[7] More importantly, the Georgia Attorney General and the Georgia Public Service Commission, the agency charged with enforcement of Georgia's junk fax statute, recently affirmed the official position of the State of Georgia that there is no established business relationship exemption to the TCPA's junk fax ban.[8] It is also worth noting that Attorneys General for practically every state and territory, including Georgia, have uniformly rejected the

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[7] See ESI Ergonomic Solutions, LLC. v. United Artists Theatre Circuit, Inc., No. CV1999-020649 (Ariz. Super. July 11, 2003) (order granting class cert.) [Append. B]; Schumacher Fin. Svcs., Inc. v. Nat'l Fed'n of Ind. Bus., No. 02AC-008228 (Mo. Cir. July 3, 2003) [Append. C]); Penzer v. MSI Mktng., Inc. d/b/a Y2Marketing, No. 01-30868CA32 (Fla. Cir. Apr. 2, 2003) (order granting class cert.) [Append. D] Schumacher Fin. Svcs., Inc. v. Metropark Comm., No. 02AC-015005 (Mo. Cir. Feb. 14, 2003) [Append. E); Girards v. Inter-Continental Hotels Corp., No. 01-3456-K (Tex. Dist. Apr. 20, 2002) [Append. F]; Kondos v. American Blast Fax, Inc., No. 01-6294 (Tex. Dist. Apr. 3, 2003) (order granting class cert.) [Append. G]; Brentwood Travel, Inc. v. Lancer, Ltd., No. 01CC-000042 (Mo. Cir. Aug. 15, 2001) [Append. H]; Kondos v. Lincoln Property Co., No. 00-08709-H (Tex. Dist. July 12, 2001) (vacated and remanded on other grounds) [Append. I]; Biggerstaff v. Websiteuniversity.com, Inc., No. 00-SC-86-4271 (S.C. Mag. Mar. 20, 2001) (order granting motion to strike defenses) [Append. J]; Biggerstaff v. Computer Products, No. 99-SC-86-2892 (S.C. Magis. Sep. 29, 1999) [Append. K).

[8] They did so in an amicus brief filed November 24, 2003 in the Georgia Court of Appeals on behalf of the plaintiff/appellant in a junk fax class action, Hammond v. Carnett's, Inc., Georgia Ct. Appeals, Case No. A03A2487. A copy of the brief is attached at Append. L. The AG and PSC wrote "[a] judicially imposed business relationship exemption would permit advertisers to claim an *implied* invitation or permission, which is contrary to the clear wording of the statute." Id., p. 3.

phantom exemption for established business relationships regarding junk faxes.[9]

The defendants principally cite three cases for the proposition that there is an established business relationship exemption to the TCPA's ban on junk faxing. None of the cases supports that proposition.

Kaufman v. ACS Systems, Inc., 2 Cal. Rptr.3d. 296 (Cal. Ct. App. 2003), pet. for review den'd 2003 Cal. LEXIS 7790 (Ca. Oct. 15, 2003) [Append. M], addressed three issues: (1) whether the TCPA required states to "opt-in" for individuals to have a private right of action against junk faxers (no[10]); (2) whether the TCPA's ban on junk faxing was constitutional (yes); and (3) whether class actions can be maintained for TCPA claims (yes). As part of the Court's analysis of the constitutionality of the TCPA, the Court merely repeated FCC material to establish that the government had a substantial interest in regulating junk faxing. Staples' claim that the Kaufman decision recognizes the applicability of an established business relationship exemption is mistaken.

The second case, Texas v. American Blast Fax, Inc., 164 F. Supp. 2d 892 (W.D. Tex. 2001) [Append. N], involved a request for an injunction, not a determination of the applicability of the supposed exemption. The court did not decide whether a junk faxer with an established

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[9] In 2002, the Attorneys General joined to write that "a business relationship exemption would rely on ***implied*** invitation or permission, which is contrary to the clear wording of the statute" and "the fact that an 'established business relationship' exemption is found in the 'telephone solicitation' definition but not in the 'unsolicited advertisement' definition means that [the] missing exemption for an established business relationship should not be added by the courts or the Commission to the 'unsolicited advertisement' definition." Comments of the National Association of Attorneys General, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (FCC 03-153, CG Docket No. 02-278) at 42 (Dec. 9, 2002) (emphasis in original) [Append. O].

[10] Accord Hooters of Augusta, Inc., v. Nicholson, 245 Ga. App. 363 (2000).

business relationship with its fax recipients was liable for statutory damages.

The third case, Destination Ventures v. FCC, 844 F. Supp 632 (D. Or. 1993) [Append. P], also addressed the constitutionality of the TCPA, not the existence of an established business relationship. Staples cites an excerpt from a footnote to claim that the Department of Justice deferred to the FCC's "authority" to create an exemption. See Defs. brief, at 27. However, neither the footnote nor the body of the opinion support the proposition that there is an established business relationship exemption to the TCPA ban on junk faxes.[11]

5. The FCC's commentary can not create an exemption to junk fax liability under the TCPA and is entitled to no deference.

The defendants cite Schneider v. Susquehanna Radio Corp., 260 Ga. App. 296 (2003), Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and Stinson v. United States, 508 U.S. 36 (1993) for the proposition that this Court should adopt the FCC's apparent recognition of an established business relationship exemption to the TCPA's ban on junk faxing. Schneider does not stand for such a proposition, and Chevron and Stinson actually mandate the opposite result.

Schneider, a prerecorded message case not involving junk faxes, is inapplicable to this case. The Georgia Court of Appeals recognized in Schneider that "The FCC acted pursuant to an explicit grant of congressional authority when it created four exemptions to the ban on

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[11] The text accompanying the selectively-quoted footnote states that "[u]nsolicited advertisements *from any source are banned*, to serve the specific purpose of protecting consumers from being burdened by the unfair shifting of advertising costs." Destination Ventures, 844 F. Supp. at 639 (emphasis added). The full text of the footnote reveals that the Destination Ventures court did not recognize an established business relationship exemption to the ban on junk faxing. Id. n.1 and accompanying text (stating unsolicited advertisements from any source are banned and those with established business relationships are free to agree to accept unsolicited advertisements).

prerecorded calls."[12] *In contrast to the TCPA's prohibition against prerecorded message calls,* the FCC lacks an explicit grant of Congressional authority to create exemptions to the ban on junk faxing. See U.S.C. § 227(b)(1)(C). Congress expressly rejected an established business relationship exemption when it deleted that very exemption from the statute. Compare H.R. 1304, 102d Cong., 1st Sess. § 3, § 227(a)(4) (passed by House, Nov. 18, 1991) with 47 U.S.C. § 227(a)(3) (version enacted into law). Therefore, any deference the Georgia Court of Appeals showed in Schneider to the FCC's rulemaking authority would be misplaced here.

Chevron and Stinson support the fact that there is no established business relationship exemption to the TCPA junk fax ban. In Chevron, the United States Supreme Court wrote:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. 467 U.S. at 842-43.

Here, Congress's intent is clear: Congress unequivocally rejected the established business relationship exemption by deleting it from the final version of the statute.[13]

This case does not, as argued by the defendants, involve the FCC engaging in "gap filling." First, there is no "gap" because Congress clearly enunciated a standard: express invitation or permission. Second, the FCC never promulgated any regulation creating any

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[12] 260 Ga. App. At 300.

[13] The Chevron court further stated that administrative regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. Given that Congress both refused to authorize the FCC to create exemptions to the TCPA's ban on junk faxing and expressly rejected an established business relationship exemption to the junk faxing prohibition, the FCC commentary relied upon by the defendants cannot create such an exemption.

exemption to the ban on junk faxing. Rather, the established business relationship exemption argued for by the defendants is merely wayward FCC commentary.

In Stinson, the United States Supreme Court outlined the deference to be accorded to agency commentary. "The functional purpose of commentary is to assist in the interpretation and application of [agency] rules." 508 U.S. at 45. "[C]ommentary is akin to an agency's interpretation of its own . . . rules." Id. The Stinson court held that "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Id.

Here, the FCC's commentary regarding the established business relationship does not interpret its own regulation or rule, but instead is directed at the statute. Even more important, the "interpretation" contradicts the express terms of the statute. "No deference is due to agency interpretation at odds with the plain language of the statute itself."[14] To hold that the FCC's illogical comments created an established business relationship exemption would fundamentally change the TCPA's definition of "unsolicited advertisement" from a fax sent without the recipient's "prior express invitation or permission" to one sent without the recipient's prior express *or implied* invitation or permission. Such bastardization of a law passed by Congress and enacted by the President is not permitted.[15]

As part of a broader rulemaking undertaken to implement the new, widely-publicized national do-not-call list, the FCC recently provided new commentary that seeks to eliminate the

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[14] Public Employee Retirement Sys. V. Betts, 492 U.S. 158, 171 (1989).

[15] Chevron, supra.; Stinson, supra.

established business relationship exemption to the TCPA's ban on junk faxing. The FCC said "The EBR [established business relationship] will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements" 18 F.C.C.R. 14,014 at ¶ 189. At the same time, the FCC modified its regulations (as opposed to issuing commentary) to require that express invitation or permission be evidenced by a signed, written statement. 18 F.C.C.R. 14,014 at ¶¶ 222-255 & Appendix A; 47 C.F.R. § 64.1200(a)(3)(f).[16] The FCC's recent action undermines the defendants' position even further.[17] The FCC now purports to eliminate the established business relationship exemption it never had the authority to create.[18]

The inconsistency of the FCC's position on the purported established business relationship exemption, the offense it does to established principles of statutory interpretation, the unanimous judicial rejection, and the FCC's self-contradictory comments combine to

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[16] In response to concern over the difficulty in getting signed, written permission on only 30 days notice from those who previously gave permission verbally, the FCC stayed the effective date of this portion of its revised regulations until January 1, 2005. In re Rules and Regulations Implementing Telephone Consumer Protection Act of 1991, 2003 WL 21961003 (F.C.C. Aug. 18, 2003)(NO. FCC 03-208, CG 02-278). The FCC stated that "under [the old] rules, those transmitting facsimile advertisements must have an established business relationship *or* prior express permission from the facsimile recipient to comply with our rules." Id. at ¶ 6 n.25 (emphasis added). Ignoring the fact that the old rules never provided for an established business relationship exemption, the use of disjunctive "or" reveals the FCC's established business relationship "exemption" was not the equivalent of express permission and, accordingly, further demonstrates that the FCC's recognition of such an "exemption" was improper given the plain language of the TCPA.

[17] "The consistency of [an agency's] interpretation is an important factor in determining the amount of deference owed." Florida Mfg. Housing Assoc., Inc. v. Cisneros, 53 F.3d 1565, 1574 (11th Cir. 1995).

[18] See 18 F.C.C.R. 14,014 at ¶ 189.

convincingly show that there is no such exemption to junk fax liability under the TCPA.

B. THE PUBLICATION OR PROVISION OF A FAX NUMBER IS NOT THE PRIOR EXPRESS INVITATION OR PERMISSION TO RECEIVE FAX ADVERTISEMENTS THE TCPA REQUIRES.

In three paragraphs of a forty-three page brief, the defendants contend that the plaintiff (and implicitly all class members) gave *express* invitation, permission ***and consent*** to receive the Fax by voluntarily giving Staples a fax number. This is little ado about nothing. Just as with the illusory established business relationship defense for junk faxes, the defendant's assertion is contrary to the plain language of the TCPA and devoid of merit. As recently held by a Texas court, "[t]here is no prior *implied* invitation or permission defense, exception to or exemption from TCPA liability for sending an unsolicited fax ad." Coontz v. Nextel Comm., Inc., 2002 TCPA Rep. 1237 (Tex. Dist. Oct. 10, 2003) [Append. Q] (emphasis supplied). Accordingly, the FCC and numerous courts have correctly recognized that voluntary publication of a fax number does not meet the TCPA's requirement of "express permission or invitation."[19]

Further, the defendants' twisting of plaintiff giving his fax number into the "express

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[19] "We do not believe that the intent of the TCPA is to equate *mere distribution or publication of a telephone facsimile number with prior express permission or invitation* to receive such advertisements..." 10 FCC Rcd. 12391, 12408 (FCC 1995) (emphasis supplied). See also Biggerstaff v. Low Country Drug Screening, 1999 TCPA Rep. 1124 (S.C. Magis. Nov. 29, 1999) [Append. R] (holding that allowing fax number to be published in membership list does not constitute express consent to receive fax advertisements); Holcomb v. SullivanHayes Brokerage Corp., 2002 TCPA Rep. 1078 (Colo. Dist. Feb. 25, 2002), p. 2 [Append. S] ("[I]t is clear that distribution or publication of a fax number implies nothing, not express consent nor a business relationship"); Jemiola v. XYZ Corp., 2003 TCPA Rep 1252, 2003 WL 23010146 (Ohio C.P. Dec. 11, 2003), p. 3 [Append. T] ("Consent may not be inferred from the mere distribution or publication of a fax number...in the absence of specific evidence of 'prior express invitation or permission' to send advertisements by fax"); Schumacher Fin. Svcs., Inc. v. Metropark Comm., supra. [Append. E] ("It is clear that Congress made a policy choice that permission or invitation to send advertising faxes must be made expressly.")

permission" required by the TCPA neither squares with common sense nor the plaintiff's expectations. As recently recognized by the Georgia Court of Appeals in the context of telephone solicitations, "the determinative test is not the caller's intention in placing the call but 'the consumer's *expectation of receiving* the call.'"[20] Verdery testified he believed his fax number was necessary to facilitate the completion of orders from Staples and to track the accumulation of Staples' Business Rewards, *not* that he expected to receive fax advertisements by giving it to Staples.

Q. By giving the personal information, which we discussed earlier, in connection with the ordering or obtaining of your customer number, what did you understand that Staples would do with that personal information?

A. Hopefully deliver the merchandise to the correct address is what I was counting on . . .

Q. . . . What did you expect that Staples would do with the personal information which you provided them in connection with your business rewards application?

A. Use it as a means to accumulate my – whatever reward I am supposed to get.

Verdery depo., p. 18.

Verdery did not give Staples its business fax number for the purpose of receiving fax

[20] Schneider v. Susquehanna Radio Corp., 260 Ga. App. 296, 581 S.E.2d 603 (2003), quoting from 14 H.R Rep. 102-317 (emphasis supplied). The pre-recorded telephone messages dealt with in Schneider were found to be exempt from liability under the TCPA's telephone solicitation provisions. The case is cited here only for the proposition that Congress intended that the consumer's expectations be considered in determining whether effective consent to receive a solicitation or advertisement was given under the TCPA.

advertisements; Verdery never asked to receive fax advertisements from Staples;[21] and Verdery had no reasonable expectation that Staples would unilaterally use its business fax number to send unwanted advertisements to its fax machine. That he and other class members[22] voluntarily gave out their fax numbers to Staples implies nothing; certainly, it does not satisfy the TCPA's clear mandate of "prior express invitation or permission."

C. THE TCPA'S PROVISIONS BANNING THE TRANSMISSION OF UNSOLICITED FAX ADVERTISEMENTS ARE CONSTITUTIONAL.

A seeming afterthought, the defendants trot out various worn constitutional attacks against the TCPA's proscription of junk faxes. Citing no decision of any state or federal court striking down any provision of the TCPA on any constitutional ground,[23] the defendants argue that: (a) the statute's junk fax ban is impermissibly vague because the phrase "prior express *invitation or permission*" is not further defined; (b) because the TCPA provides civil penalties of $500 or $1,500 for each junk fax violation, it is "quasi-criminal in nature" and must therefore past muster under more stringent constitutional standards of due process; (3) the statute violates the Eighth Amendment by subjecting the defendants to purportedly excessive civil fines; and (4) the statute violates Staples' First Amended rights of free speech. Defs. brief, at 31-35.[24] These

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[21] Verdery Aff., ¶ 7.

[22] While there has been no discovery yet regarding the class, plaintiff relies upon Staples' representations that it only used fax numbers obtained directly from its customers.

[23] The plaintiff is aware of only one un-reversed decision of any court that has found a constitutional problem with the TCPA's junk fax provisions:

[24] Realizing the TCPA has withstood numerous constitutional challenges on-its-face, the defendants change tactics and limit their constitutional attacks "as-applied" to this case. Such word-smithing is to no avail; the same arguments made by defendants have been rejected by

contentions are without support, unpersuasive, and may readily be dismissed.

1. **The TCPA does not violate the defendants' due process rights; is not unconstitutionally vague; and does not violate the Eighth Amendment's prohibition on excessive fines.**

The defendants' due process, vagueness and Eighth Amendment attacks on the TCPA are interrelated and co-dependent. Both the due process and excessive fines argument hinge on a finding that, as applied to this case, the phrase "prior express invitation or permission" is unconstitutionally vague.[25] In its recent decision in Harjoe v. Herz Fin., 108 S.W.3d 653 (Mo. 2003),[26] the Supreme Court of Missouri considered and rejected the argument that the TCPA was unconstitutionally vague with respect to junk faxes. Applying the following standards, the court upheld the statute's language:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. The test in enforcing the doctrine is *whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. However, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.* Moreover, it is well established that 'if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and ... the courts must endeavor, by every rule of construction, to give it effect.' Finally, courts employ 'greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.' Harjoe, 108 S.W.3d at 655 (citations omitted) (emphasis supplied).

The Harjoe decision is in line with other decisions holding that the TCPA's terms are not

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courts that considered them (see citations below).

[25] Defs. brief, at 31.

[26] Append. U.

constitutionally void for vagueness.[27]

There is nothing vague or ambiguous about the phrase "prior express permission or invitation." Contending that the words "permission" and "invitation" are unclear and subject to varying interpretations,[28] the defendants conveniently ignore the crucial preceding qualifier "*express*." As defined by Black's Law Dictionary, "express" means

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied." Black's Law Dictionary (Revised 6th ed.).

Regardless of how one interprets permission or invitation, the requirement that such permission or invitation be "express" relieves any possible confusion over those terms.

The TCPA unequivocally requires that an advertiser obtain clear, definite, direct and

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[27] See Kaufman v. ACS Systems, Inc., 110 Ca. App. at 921, 2 Cal. Rptr. 3d at 325 [Append. M] ("Defendants have failed to show that the meaning of the TCPA 'is uncertain under any and all circumstances'") (citation omitted); Covington & Burling v. Int'l Mktg. & Res., Inc., 2003 WL 21384825 (D.C. Super. Apr. 16, 2003) [Append. V] ("There is no guesswork necessary to ascertain the meaning of the common words 'property,' 'goods,' 'services,' or 'quality'...Courts have also failed to find the word 'commercial' to be vague"); Margulis v. P&M Consulting, Inc., 2003 Mo. App. LEXIS 1810 (Mo. App. E.D. Nov. 18, 2003) [Append. W] (upholding constitutionality of trial court's construction of terms "survey" and "unsolicited advertisement").

[28] The defendants strain to find ambiguity where none exists. Though they cite various alternative definitions, there can be no serious debate that the words permission and invitation "convey[] to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Harjoe, supra. The TCPA is easily understood by the average person (apparently precluding junk faxers) as requiring an advertiser to obtain *actual consent* before sending a fax advertisement. See Jemiola v. XYZ Corp., supra., p. 3 [Append. T] ("The touchstone is consent.")

explicit consent *before* transmitting a fax advertisement.[29] Such a reasonable and practical construction supports and gives effect to the statute, as courts are required to do. Harjoe, supra.

Contrary to the defendants' assertions, the TCPA's civil penalties of $500 or $1,500 per junk fax violation do not implicate the Eighth Amendment's prohibition against excessive fines. The Missouri Supreme Court also addressed this constitutional challenge to the TCPA in Harjoe, supra. Rejecting the advertiser's Eighth Amendment challenge, the court held that

> the excessive fine provision of the eighth amendment 'does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.' The excessive fines clause is intended to constrain the power of the state. 'Simply put, the primary focus of the Eighth Amendment was the 'prosecutorial' power, not concern with the extent or purposes of civil damages.' Harjoe, 108 S.E.3d at 655, quoting from Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal Inc., 492 U.S. 257, 264, 266, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989).

The Harjoe decision is in line with numerous other decisions holding that the statutory penalties provided in the TCPA do not violate the Constitution.[30] Further, the defendants' Eighth

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[29] Biggerstaff v. Low Country Drug Screening, supra., pp. 6-7 [Append. R] ("'prior express permission or invitation' requires that the sender obtain *prior consent* from the recipient in *direct and explicit terms, set forth in words*, and *not left to inference or implication*") (emphasis supplied); Holcomb v. SullivanHayes Brokerage Corp., supra., p. 2 [Append. S] (the TCPA requires "a specific, individual, identifiable, affirmative pre-fax request from the recipient").

[30] See Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162, 1167 (S.D.Ind.1997) [Append. X] ("[W]e find that §§ 227(b)(3)(B), which provides for a minimum penalty of $500 for each violation of the TCPA, does not violate the Due Process clause of the Fifth Amendment"); Whiting Corp. v. MSI Mktg., Inc., 2003 TCPA Rep. 1141 (Ill. Cir. Apr. 3, 2003), p. 11 [Append. Y] ("Any penalty computed by multiple violations would be a result of the defendants' use of technology to aggressively violate a statute that is clear on its face"); Texas v. Am. Blast Fax, Inc., 121 F. Supp. 2d at 1091 [Append. N] ("[T]he TCPA's $500 minimum damages provision, when measured against the overall harms of unsolicited fax advertising and the public interest in deterring such conduct, is not 'so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable') (*citing* St. Louis, Iron Mo. & So. R'wy v. Williams, 251 U.S. 63, 40 S. Ct. 7, 64 L. Ed. 139 (1919); Levitt v. Fax.com, Inc., 2002 TCPA Rep. 1069 (Md.

Amendment challenge, even if permitted, would not be not ripe since no damages have been assessed in this case.[31]

2. The TCPA's ban on junk faxes does not impermissibly restrict the defendants' commercial speech rights.

Finally, the defendants contend that the TCPA's prohibition against unsolicited fax advertisements violates Staples' purported free speech rights. The only support the defendants can muster for their argument is the recent decision of a Colorado federal district court holding that the just-enacted national do-not-call list ("DNC") violates the First Amendment.[32] The defendants fail to explain how that decision, which was subsequently mooted by Congressional action, has any application here. Nor do the defendants properly distinguish between ordinary free speech rights and the appropriate regulation of commercial speech.

"[T]he Constitution 'accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.'"[33] The United States Supreme Court has laid out a multi-part balancing test for determining whether regulation of commercial speech is

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Cir. Nov 27, 2002), pet. cert. granted 374 Md. 582, 824 A.2d 58 (Md. June 12, 2003), p. 14 [Append. Z] ("[i]n light of Congress' hearings [regarding penalties for *unlawful* fax transmissions], and their discretion in setting statutory penalties, the TCPA damages provisions do not come under the test set forth in St. Louis [251 U.S. 63]").

[31] See Kaufman v. ACS Systems, Inc., 110 Cal. App. 4th at 922 [Append. M], *citing to* Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 303-304, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981).

[32] Mainstream Mktg. Servs. v. FTC, 2003 U.S. Dist. LEXIS 16807 (D. Colo. 2003) [Ex. V *to Defs. Motion*].

[33] Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 349, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986).

unconstitutional:[34] (a) first, is the speech misleading or does it concern unlawful activity?;[35] (b) if the speech is neither unlawful nor misleading, is the asserted governmental interest substantial?; and (c) if the asserted interest is substantial (i) does the regulation directly and materially advances the governmental interest asserted and (ii) is the regulation narrowly tailored to serve that interest? Utilizing this standard, practically every federal and state court presented with a First Amendment challenge to the TCPA's junk fax provisions has upheld them.[36]

As best explained in a recent Ohio decision,

The sending of unsolicited commercial fax advertisements is not a right protected by the Constitution. It is well-settled that nothing in the First or Fourteenth Amendments authorizes a merchant to print its advertisements by using someone else's fax machine, paper and ink without prior consent to do so. There is simply no "right" to force commercial advertising material into another person's property at the property owner's expense. Defendant is not restricted from publishing its advertisements on its own paper, with its own ink, and on its own printing press. Jemiola v. XYZ Corp., supra. (citations omitted).[37]

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[34] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

[35] If unlawful or misleading, the speech has no protection. Central Hudson Gas, supra.

[36] See Missouri ex rel. Nixon v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003) [Append. AA]; Destination Ventures, Ltd. v. FCC, supra. [Append. P]; Moser v. FCC, 46 F.3d 970 (9th Cir. 1995) [Append. BB]; Texas v. Am. Blast Fax, Inc., supra. [Append. N]; Kenro, Inc. v. Fax Daily, Inc., supra.[Append. X]; Harjoe v. Herz Fin., supra.[Append. U]; Kaufman v. ACS Systems, Inc., supra. [Append. M]; Minn. v. Sunbelt Communs. & Mktg., 282 F. Supp. 2d 976, 2002 U.S. Dist. LEXIS 18990 (D. Minn. Sept. 30, 2002) [Append. CC].

[37] Citing Missouri v. Am. Blast Fax, Inc., supra.; Destination Ventures Ltd. v. FCC, supra.; and Texas v. American Blast Fax, supra.

The defendants simply have no constitutionally protected right to send unsolicited fax advertisements in violation of the TCPA.

D. O.C.G.A. § 46-5-25 HAS NO APPLICATION TO THIS CASE.

In a convoluted exercise in circular reasoning, the defendants suggest that the existence of an established business relationship exemption in O.C.G.A. § 46-5-25, Georgia's junk fax statute, supports reading such an exemption into the TCPA. Their argument appears to be that since Georgia's statute expressly permits fax advertising to recipients with an established business relationship with the sender, and the Georgia statute is arguably not pre-empted by the TCPA,[38] then the TCPA should be read *in pari materia* with the Georgia statute. Without saying so, the defendants impliedly suggest that the more restrictive TCPA is effectively pre-empted by Georgia's statute. Such illogic is wholly unsupported, and should be rejected out-of-hand.

The plaintiffs' claims in this case arise under the TCPA, not the more permissive provisions of O.C.G.A. § 46-5-25.[39] Consequently, the Georgia statute has absolutely no relevance to this case.[40] Moreover, a side-by-side comparison of the state and federal statutes

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[38] The defendants selectively quote the language of 47 U.S.C. § 227(e)(1)(A) and cite the decision of the 8th Circuit in Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995) for the proposition that Georgia's junk fax statute is not pre-empted by the TCPA's obviously more restrictive provisions. The plaintiff notes that while the TCPA saves *more restrictive* state bans on unsolicited fax advertisements, it does not expressly do so with respect to less restrictive statutes such as O.C.G.A. § 46-5-25. Consequently, the 8th Circuit's ruling in Van Bergen has been rightfully questioned by other courts. See Mathemaesthetics, Inc. v. Reiner, 2001 TCPA Rep. 1039 (Colo. Dist. Aug. 15, 2001) [Append. DD].

[39] The Amended Complaint neither cites nor makes any reference to O.C.G.A. § 46-5-25. "[T]he plaintiff need only choose the more restrictive federal law upon which to base his cause of action." Biggerstaff v. Low Country Drug Screening, supra. [Append. R].

[40] It is interesting to note that courts have found that while the TCPA reaches both interstate *and* intrastate communications, similar state statutes can *only* regulate intrastate

substantially weakens the defendants' claim that an established business relationship exemption should be read into the TCPA's junk fax ban. Had Congress intended to exempt such fax transmissions from liability under the TCPA, it simply would have done as the Georgia General Assembly did and unequivocally write the exemption into the statute.[41] The conspicuous absence of a business relationship exemption from the TCPA's junk fax provisions,[42] in stark contrast with its clear inclusion in O.C.G.A. § 46-5-25, reveals the obvious–that Congress went further than did Georgia in protecting consumers from unwanted faxes. Finally, compliance with a less restrictive state statute such as O.C.G.A. § 46-5-25 does not provide immunity for a violation of the TCPA.[43]

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conduct. See Texas v. Am. Blast Fax, Inc., supra. [Append. N], Hooters of Augusta, Inc. v. Nicholson, 245 Ga. App. 363, 537 S.E.2d 468 (Ga. App. 2000) and Minn. v. Sunbelt Communs. & Mktg., supra. [Append. CC] (reach of TCPA extends to interstate and intrastate communications); and see Kaufman v. ACS Systems, Inc., supra. and Bonime v. DirecTV, Inc., Case No. B163051, Ca. App. 2nd Dist., Dec. 12, 2003 [Append. EE] (states are powerless to regulate interstate communications).

[41] Although O.C.G.A. § 46-5-25 went into effect July 1, 1990, almost 18 months before Congress enacted the TCPA, there is no evidence in the legislative history that Congress considered or was even aware of the existence of the Georgia statute in drafting and enacting the TCPA. See e.g., House Report 102-317 (Ex. K to defendants' motion for summary judgment), at p. 25 ("*Connecticut and Maryland* have enacted laws banning the use of facsimile machines for unsolicited advertising. Similar bills are currently pending in the legislatures of about half the states.") (Emphasis supplied.)

[42] See Section III(A), infra.

[43] See Hooters of Augusta, Inc. v. Nicholson, supra. (existence of Georgia law does not bar private action under TCPA for transmission of unsolicited fax advertisements); Texas v. American Blastfax, Inc., 121 F. Supp. 2d 1085, 1089 (W.D. Tex. 2000) ("Simply because a party complies with one law does not preclude it from violating another"); Van Bergen v. State of Minn., 59 F.3d 1541 (8th Cir. 1995) (defendant required to comply with TCPA regardless of applicability of state statute governing unsolicited fax advertisements); Minn. v. Sunbelt Communs. & Mktg., supra., p. 282 F. Supp. 2d at 984 [Append. CC] (case law interpreting TCPA "does not stand for the proposition that a state statute can give permission to violate a

E. THE PLAINTIFF'S CLAIMS UNDER THE TCPA ARE PERMITTED UNDER GEORGIA LAW.

The defendants attempt to revisit what has already been conclusively established–that private actions for violations of the TCPA may be brought in Georgia state courts. See Hooters of Augusta, Inc. v. Nicholson, supra. But, they add one twist: that *this* action is not permitted because Georgia law allows fax advertisements to be sent to recipients having an established business relationship with the sender.[44]

The defendants' attempted distinction between this case and the Hooters decision is meaningless. As previously shown, the fact that the defendants' conduct might comply with state law has no relevance to whether such conduct gives rise to claims under the TCPA.[45] Moreover, the Hooters court fully considered the existence and import of Georgia's junk fax statute and nonetheless found that TCPA suits were "otherwise permitted" in Georgia under 47 U.S.C. § 227(b)(3).[46] Despite defendants' strained efforts to otherwise, this case is squarely within Hooters and is permitted under the TCPA and Georgia law.

F. THE DEFENDANTS VIOLATED THE TCPA BY SENDING THE FAX TO THE PLAINTIFF.

Stripped of affirmative defenses, the defendants are in clear violation of the TCPA.[47] The

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federal statute").

[44] O.C.G.A. § 46-5-25(c)(1).

[45] See footnote 35, infra.

[46] 245 Ga. App. 363, 365 (2000).

[47] To be entitled to summary judgment, the plaintiff must (a) pierce the defendants' affirmative defenses, Peppers v. Siefferman, 153 Ga. App. 206, 265 S.E.2d 26 (1980), (b) conclusively establish the absence of defenses to liability, Fletcher v. Ford, 189 Ga. App. 665, 377 S.E.2d 206 (1988), cert den'd 189 Ga. App. 912, 377 S.E.2d 206, and (c) show the nonexistence of any genuine issue of material fact, Williams v. Trust Co., 140 Ga. App. 49, 230

statute makes it "unlawful for any person...to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[48] An "unsolicited advertisement" is "any material *advertising the commercial availability or quality of any property, goods, or services* which is transmitted to any person *without that person's prior express invitation or permission.*"[49] The TCPA places the burden on the defendants to prove that they obtained from plaintiff (and each class member) express invitation or permission before sending the Fax.[50]

The Fax was sent to Verdery by Quick Link on behalf of Staples; it was received by Vedery; and it indisputably advertised the commercial availability of office products sold by the defendant Staples.[51] It is equally undisputed that Verdery never gave the defendants prior express invitation or permission to send the Fax.[52] It is clear from the unchallenged facts, the

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S.E.2d 45 (1976). As shown in Sections III(A)—III(E), infra., the defendants' affirmative defenses fail as a matter of law. As shown in this Section III(F), there is no genuine issue of material fact preventing the entry of judgment on the defendants' liability to the plaintiff under the TCPA.

[48] 42 U.S.C. § 227(b)(1)(C).

[49] 47 U.S.C. § 227(a)(4) (emphasis supplied).

[50] Jemiola v. XYZ Corp., supra., p. [Append. T] ("An advertiser has the burden of proof with regard to the issue of 'prior express invitation or permission.' This is plain from the legislative history of the TCPA.")

[51] Plaintiff's Statement of Material Facts, ¶¶ 1, 2, 12-13.

[52] Once a moving party has presented evidence sufficient to entitle that party to judgment as a matter of law, the burden shifts to the responding party to bring forth sufficient evidence to create an issue of fact preventing the entry of judgment. Meade v. Heimanson, 239 Ga. 177, 236 S.E.2d 357 (1977) (once the moving party presents a prima facie showing, the responding party "must come forward with rebuttal evidence *at that time*, or suffer judgment against him") (emphasis in original). The defendants have not produced, and plaintiff submits can not produce,

plain language of the TCPA and judicial precedent that the transmission of the Fax to the plaintiff violated the TCPA and that the defendants are liable for the violation.

IV. CONCLUSION.

For the foregoing reasons, the plaintiff requests that the Court deny the defendants' summary judgment motion and grant the plaintiff's cross-motion for partial summary judgment.

Respectfully submitted this 9th day of January, 2004.

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any evidence showing that Verdery gave express permission to receive the Fax.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT by electronic mail, delivery confirmation requested, and by depositing the same in the United States mail with proper postage affixed thereto and addressed as follows:

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This 9th day of January, 2004.

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